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No. 94-1806

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

SHRICHAND CHAWLA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether general creditors of a failed international banking enterprise are entitled to assert a "constructive trust" over the enterprise's United States assets under 18 U.S.C. 1963(*l*), with the effect of preventing criminal forfeiture of those assets.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 46 F.3d 1185. The opinion of the district court (Pet. App. A17-A34) is reported at 833 F. Supp. 9.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1995. The petition for a writ of certiorari was filed on May 2, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The four corporate respondents—BCCI Holdings (Luxembourg), S.A.; Bank of Credit and Commerce International, S.A.; Bank of Credit and Commerce International (Overseas) Limited; and International Credit and Investment Company (Overseas) Limited (collectively known as BCCI)—pleaded guilty in the United States District Court for the District of Columbia to an information charging them with violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962. BCCI agreed to criminal forfeiture of virtually all of its assets in the United States. In January 1992, the district court accepted the guilty plea and entered an order of forfeiture under 18 U.S.C. 1963(a). See Pet. App. A2-A4, A18. Petitioners—nine individuals and entities claiming to represent a class of more than 1,000,000 BCCI depositors worldwide—challenged the forfeiture under 18 U.S.C. 1963(*l*)(6)(A), claiming superior title to all or part of the assets to be forfeited. The district court denied petitioners' challenge (Pet. App. A17-A34), and the court of appeals affirmed (*id.* at A1-A16).[1]

1. The 1991 collapse of BCCI, which had operations in some 69 countries, caused courts in Luxembourg and the Cayman Islands to appoint fiduciaries to consolidate BCCI's assets for global distribution to its international creditors and depositors. The

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[1] Petitioners were appellants in the court below. Pet. App. A1. In addition to the four corporate respondents, Raymond Davies, as conservator for BCCI's branch in Sierra Leone, was the appellant in a related case that was consolidated with this case before the court of appeals (see *id.* at A1-A2, A6), and he is therefore a respondent under this Court's Rule 12.4.

forfeiture order in this case provided that half the forfeited assets would be surrendered to the global liquidation fund, while the other half would be reserved to the Attorney General's discretionary allocation for various purposes, including offsetting losses to the FDIC and the American taxpayer. The total amount to be forfeited—some $552 million—was to come largely from United States bank accounts maintained in the name of various BCCI branches overseas. Pet. App. A3-A4.

Section 1963(*l*)(2) of Title 18 allows challenges by third parties "asserting a legal interest in property which has been ordered forfeited to the United States pursuant to" RICO. Section 1963(*l*)(6), in turn, requires the district court to amend the forfeiture order if the claimant establishes that "legal right, title, or interest in the property * * * was vested in the petitioner rather than the defendant," that the claimant's interest "was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property," or that the claimant "is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section." 18 U.S.C. 1963(*l*)(6)(A) and (B).

2. Petitioners are nine individuals and entities who claim to represent a class of more than 1,000,000 BCCI depositors. They challenged the forfeiture in this case under 18 U.S.C. 1963(*l*). Pet. App. A5, A19. The same putative class earlier unsuccessfully filed suit in federal court in California against parties who had allegedly contributed to BCCI's collapse. *In re BCCI Depositors Litigation*, No. CV 91-4483 CBM

(MDL-908) (C.D. Cal. May 20, 1992) (order dismissing complaint) (*reprinted at* Pet. App. A35-A72), aff'd *sub nom. Hamid* v. *Price Waterhouse*, 51 F.3d 1411 (9th Cir. 1995).

The district court in this case, after noting that petitioners' shifting characterization of their claims had made it difficult "to understand the nature of the legal right, title, or interest in property" that they alleged (Pet. App. A25), declined to amend the forfeiture order. The court first expressed skepticism regarding petitioners' claim to represent a worldwide class of depositors, explaining that no class was ever certified in the case brought by petitioners and dismissed by the district court in California, and that no motion for class certification was ever filed with the district court in this case. *Id.* at A22. Nonetheless, in view of its conclusion on the merits, the court accepted petitioners' class allegations for purposes of ruling on the government's motion to dismiss. *Id.* at A22-A23. Similarly, the court had doubts that petitioners' written submissions to the court had adequately framed any constructive trust claim. *Id.* at A25-A26. The court agreed, however, to provide petitioners "a generous benefit of the doubt and treat their petitions as if they alleged interests arising both from constructive trusts and from general debtor/creditor relationships." *Id.* at A26.

The district court held (Pet. App. A26-A27) that an equitable interest under a "constructive trust" theory represented a sufficient "legal interest in property which has been ordered forfeited" to support a challenge to the forfeiture order under 18 U.S.C. 1963(*l*)(2). The court nonetheless concluded that it would be "inappropriate to impose a constructive trust in favor of the specific petitioners" in this case.

Pet. App. A27. The court explained that it had approved the BCCI plea agreement in this case in large part because it "provided for the creation of a worldwide victim fund so that 'innocent victims of BCCI's wrongdoing can recover at least a portion of lost assets in as fair a manner as possible—equitable, orderly, and expeditious.'" *Ibid.* (quoting transcript of plea hearing). In the court's view, forfeiture under the plea agreement would allow orderly administration of the global distribution fund, thereby avoiding "piecemeal and unfair distribution." *Ibid.* Thus, the court concluded:

> Assuming as true the petitioners' allegations that all deposits made by the purported class of claimants were fraudulently induced, there can be no doubt that imposition by this Court of a constructive trust on those deposits would cause gargantuan disruption of the global liquidation proceedings currently underway. Besides the practical consideration of this Court's inability to adjudicate whether each of the approximately one million depositors can establish that they made deposits and that such deposits were forfeited by this Court, imposing a trust would significantly harm the abilities of other BCCI creditors to recover fair portions of lost funds. Therefore, * * * a constructive trust in favor of the petitioners will not be imposed.

Id. at A27-A28.

Having refused to impose a constructive trust, the court considered petitioners "simply as general creditors of BCCI." Pet. App. A28. The court explained that "[b]ecause general creditors are unable to assert interests in specific assets, they cannot

assert legal rights, titles, or interests 'in property which has been ordered forfeited' as required by § 1963(*l*)(2)." *Id.* at A29. Petitioners therefore failed to meet the threshold requirement for standing to challenge the forfeiture. In addition, the court indicated that it would have rejected petitioners' claim on the merits, because "they could not, as general unsecured creditors, be considered to have the 'vested' or 'superior' rights, titles, or interests in forfeited property which are required by § 1963(*l*)(6)(A)." *Id.* at A30. Finally, the court noted that if it had been willing to impose a constructive trust, it "appear[ed]" that petitioners might have been able to recover on the merits, "but only if they could trace their interests to specific funds before the Court." *Id.* at A30 n.6.

3. The court of appeals affirmed. Pet. App. A1-A16. The court agreed that petitioners' constructive trust claim asserted a "legal" interest in property for purposes of 18 U.S.C. 1963(*l*), even though the claim was equitable in nature. Pet. App. A8-A11. The court thought it unclear whether, in drafting Section 1963(*l*), Congress used the terms "legal" and "equitable" in their technical or more general senses, but it ultimately refused to recognize any "distinction between technically legal and technically equitable claims in forfeiture challenges." Pet. App. A10. Nonetheless, the court concluded that "a constructive trust may not be used to defeat the government's forfeiture claim." *Id.* at A11.

Noting that "[t]he key words in section 1963(*l*)(6)(A) to identify statutorily cognizable third party interests are 'vested,' 'superior,' and 'at the time,'" the court interpreted the statute to require a claimant to "establish that his interest had vested or

was superior to the defendant's interest *'at the time of the commission of the acts which gave rise to the forfeiture.'*" Pet. App. A11 (quoting 18 U.S.C. 1963(*l*)(6)(A)). The court explained that a constructive trust is "a fictional trust—not a real one," and represents "a *remedy* that a court devises after litigation." Pet. App. A12. Thus, such a trust "could not have been shown to exist at the time the [forfeiture defendant's] acts were committed." *Ibid.*

The court also reasoned that another provision of RICO provides that "title in all criminally acquired property of the defendant is deemed to 'vest[] in the United States upon the commission of the act giving rise to forfeiture.'" Pet. App. A12 (quoting 18 U.S.C. 1963(c)). Because the statute itself "creates a retroactive legal fiction similar to a constructive trust for the benefit of the United States," the court held, "[i]t is not open to a court to fashion another remedy (a competing fiction) that also reaches back to snatch the property away from the United States—which is exactly what a constructive trust would do." Pet. App. A12. Accordingly, the court of appeals "disagree[d] with those courts that have determined that a constructive trust can be interposed as superior to the government's forfeiture claim," because those courts "did not consider whether a judicially imposed constructive trust would be inconsistent with the statutory remedial scheme." *Ibid.*[2]

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[2] Both the district court (Pet. App. A30-A32) and the court of appeals (*id.* at A13-A16) also rejected petitioners' alternative argument that they should be treated as "bona fide purchasers" for purposes of 18 U.S.C. 1963(*l*)(6)(B). Petitioners do not renew that claim in this Court.

ARGUMENT

Petitioners contend (Pet. 13-28) that they are entitled to assert a constructive trust over certain forfeited assets of BCCI, and that their interest is superior to the government's interest in those assets. The court of appeals correctly rejected that claim, and the matter does not warrant further review.

1. We note, at the outset, that petitioners have neither requested nor obtained certification as representatives of the class of worldwide BCCI depositors that they purport to represent. See Pet. App. A22. Moreover, petitioners waived their right to assert the "constructive trust" theory on which the courts below ruled, and on which they now seek to proceed, by failing to raise it in a timely manner or to comply with the notice requirements of 18 U.S.C. 1963(*l*)(3). See Pet. App. A25-A26. Despite the court of appeals' statement to the contrary (*id.* at A8), the government did urge that court to reject petitioners' "constructive trust" claims solely on the basis of petitioners' procedural default. See, *e.g.*, Gov't C.A. Br. 35-36 (despite "ample reasons" to sustain the district court's decision on the merits, "the government asks that this Court rule as a procedural matter that [the] Class Petitioners waived their opportunity to assert an interest as beneficiaries of a constructive trust by failing to comply with the requirements of § 1963(*l*)(3)"). Under the circumstances, neither court below should have considered the merits of the claim that petitioners seek to raise here. That procedural default is also a sufficient basis for the denial of review by this Court.

2. Congress enacted 18 U.S.C. 1963(*l*) in order to allow third parties an opportunity to challenge

criminal forfeiture orders on the ground that some or all of the property to be forfeited in fact belonged to them, rather than to the defendant. See *United States* v. *Schwimmer*, 968 F.2d 1570, 1580 (2d Cir. 1992). A third party challenging the validity of a criminal forfeiture must therefore assert, as a threshold matter, "a legal interest in property which has been ordered forfeited." 18 U.S.C. 1963(*l*)(2). To prevail on its claim, the third party must then demonstrate that the "legal right, title, or interest in the property * * * was vested in the petitioner rather than the defendant," or that the claimant's legal interest "was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property." 18 U.S.C. 1963(*l*)(6)(A). A party that cannot demonstrate such a superior legal interest may appeal to the Attorney General, who may "grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims * * *, or take any other action which is in the interest of justice and which is not inconsistent with" RICO's other provisions. 18 U.S.C. 1963(g)(1).

Petitioners' claim depends on the imposition of a "constructive trust" on their deposits, which petitioners contend BCCI procured by fraud. See, *e.g.*, Pet. 23-24. The term "constructive trust" describes an equitable remedy, not a basis for asserting legal title. See, *e.g.*, Pet. App. A8-A9 (citing *Healy* v. *Commissioner*, 345 U.S. 278, 282 (1953)), A12; Pet. 23-24. As the government argued in the court below (see Pet. App. A8-A10), RICO's provisions are properly read to limit forfeiture challenges under Section 1963(*l*) to legal claims, while remitting equitable claims to the Attorney General's discretion to act "in

the interest of justice" (18 U.S.C. 1963(g)(1)). While the court of appeals incorrectly rejected that argument (Pet. App. A8-A11), it went on correctly to reject petitioners' request for equitable relief.

The court of appeals focused on the requirement that a claimant's right to the property at issue must be "vested" or "superior" to the defendant's "at the time of the commission of the acts which gave rise to the forfeiture." Pet. App. A11 (quoting 18 U.S.C. 1963(*l*)(6)(A)). As the court pointed out (Pet. App. A12), "[a] constructive trust is a *remedy* that a court devises after litigation." Even when that remedy is a permissible one, the decision to grant or withhold it under particular circumstances is a matter for the sound discretion of the district court. See, *e.g.*, *Downriver Community Federal Credit Union* v. *Penn Square Bank*, 879 F.2d 754, 758 (10th Cir. 1989), cert. denied, 493 U.S. 1070 (1990). Thus, it is impossible to know whether a constructive trust covering certain property "exists" until after the completion of litigation. The court of appeals therefore correctly held that, for purposes of Section 1963(*l*), the equitable interest on which petitioners rely "could not have been shown to exist at the time [BCCI's illegal] acts were committed." Pet. App. A12.

Petitioners argue (Pet. 25-26) that a constructive trust arises immediately upon the commission of whatever wrongful act might ultimately persuade a court to impose one. It is true that once such a trust has been declared, the law assumes that the property in question was held "in trust" from the moment it was wrongfully acquired. In the context of applying Section 1963(*l*), however, petitioners' theory ignores the wide discretion normally accorded district courts in fashioning remedies. If a court decides in a par-

ticular case, as the district court did here (see Pet. App. A27-A28), that it would be inequitable, under all the circumstances, to impose a constructive trust, then an interest of the type alleged by petitioners never arises. Because "all the circumstances" relevant to that remedial decision cannot be known before the time the decision is made, such an interest cannot be "vested," or "superior" to the defendant's legal title, before that time.

As the court of appeals explained, that conclusion is strengthened in the context of Section 1963(*l*) by the fact that RICO includes its own relation-back doctrine in Section 1963(c), which provides that title to all property subject to forfeiture under the Act "vests in the United States upon the commission of the act giving rise to forfeiture." Because imposition of a constructive trust would be in tension with that statutory scheme, the court was correct to hold that it should not "fashion another remedy (a competing fiction) that also reaches back to snatch the property away from the United States." Pet. App. A12; compare *In re Omegas Group, Inc.*, 16 F.3d 1443, 1448-1453 (6th Cir. 1994) (constructive trust may not be used to vest unsecured creditor with rights greater than those provided for under federal bankruptcy law); *Downriver Community Federal Credit Union* v. *Penn Square Bank*, 879 F.2d at 758 (constructive trust may not be used to give uninsured bank depositors greater rights than otherwise available under federal banking law).

3. Petitioners suggest (Pet. 27-28) that the court of appeals' reliance on Section 1963(c) conflicts with this Court's decision in *United States* v. *92 Buena Vista Avenue*, 113 S. Ct. 1126 (1993). That is incorrect. *92 Buena Vista Avenue* held that 21 U.S.C. 881(h),

which uses essentially the same words as 18 U.S.C. 1963(c), could not operate to relate the government's title to property back to the time of a defendant's criminal acts until the government first secured a judgment of forfeiture. 113 S. Ct. at 1136-1137 (plurality opinion); *id.* at 1141 (Scalia, J., concurring in the judgment). In this case, the government had secured such an order of forfeiture, see Pet. App. A18, which petitioners were seeking to "amend" by invoking their own, equitable relation-back doctrine. 18 U.S.C. 1963(*l*)(6). *Buena Vista* dealt with the rights of alleged innocent owners whose property interests existed at the time of the event giving rise to the forfeiture. Nothing in *Buena Vista* suggests that a claimant may seek to establish, via "a competing [legal] fiction" (Pet. App. A12), a retroactive property interest that trumps the right vested in the government by the order of forfeiture. Indeed, *Buena Vista* indicates that the retroactive vesting of property interests cannot occur until the court renders a judgment accepting the relevant claim. That proposition supports the conclusion that petitioners' alleged interest, which was never recognized by a judicial declaration of a "constructive trust," did not exist "at the time of the commission of the acts which gave rise to the forfeiture." 18 U.S.C. 1963(*l*)(6)(A).

4. Petitioners contend (Pet. 11 & n.6, 13) that the decision below conflicts with decisions of five other courts of appeals. It is not clear, however, that any other court would have reached a different result on the facts of this case.

Three of the cases that petitioners cite did not address the constructive trust issue at all, or did so only in passing dicta. In *United States* v. *Reckmeyer*, 836 F.2d 200, 205-209 (1987), the Fourth Circuit held

only that an unsecured creditor might in certain circumstances qualify as a "bona fide purchaser for value" under 21 U.S.C. 853(n)(6)(B), a provision parallel to 18 U.S.C. 1963(*l*)(6)(B). Petitioners do not rely on Section 1963(*l*)(6)(B) in this Court. See note 2, *supra*. Similarly, in *United States* v. *Lavin*, 942 F.2d 177, 187 n. & 12 (1991), the Third Circuit held only that an embezzlement victim could not assert a valid claim as a "bona fide purchaser" (under 21 U.S.C. 853(n)(6)(B)) after a forfeiture order was entered against the property of the embezzler (who was also a drug dealer). The claimant in *Lavin* specifically conceded that its interest did not relate back to the time of the acts giving rise to the forfeiture, and the case therefore involved none of the questions that petitioners seek to present here. See *Lavin*, 942 F.2d at 185-187 & n.12. And in *United States* v. *Campos*, 859 F.2d 1233, 1238-1239 (1988), the Sixth Circuit held that the unsecured trade creditors before it could not show the threshold "legal right, title, or interest in the [forfeited] property" necessary to state a claim under 21 U.S.C. 853(n)(6), and merely noted that the requisite "superior" interest could only be "one in the nature of a lien, mortgage, recorded security device, constructive trust, valid assignment, or the like." That suggestion does not demonstrate that the *Campos* court would have reached a decision different from that of the court below on the facts of this case.

Only two of the cases petitioners cite actually addressed the constructive trust issue, and neither decision conflicts with the decision below. In *United States* v. *Marx*, 844 F.2d 1303, 1306-1308 (7th Cir. 1988), the claimant asserted that specific shares of stock otherwise subject to forfeiture (under 21 U.S.C. 853) were held in the defendant's name subject to an

express trust arrangement. The Seventh Circuit recognized the express trust, and its references to a "constructive trust" referred to the appropriate remedy for the trustee-defendant's breach of the beneficiary-claimant's rights under that trust. *Marx*, 844 F.2d at 1307. Notably, the court of appeals in this case referred to such a breach of an express trust obligation as an illustration of the type of equitable interest that it believed Section 1963(*l*) would reach. Pet. App. A11. At the same time, the *Marx* court did not consider a constructive trust claim based on a fraud on general creditors who lacked any specific interest in the particular property forfeited. The two cases therefore involved different settings, and their conclusions are compatible with one another.

Finally, petitioners cite *United States* v. *Schwimmer*, *supra*. *Schwimmer* did hold (968 F.2d at 1582) that "constructive trust" interests could under some circumstances satisfy the "legal interest" requirement of Section 1963(*l*)(2). On the facts before it, however, the court actually reversed a decision amending a forfeiture order, holding that "a constructive trust warrants an amendment of an order of forfeiture only if the District Court finds that the property ordered forfeited is traceable to property held in constructive trust." 968 F.2d at 1574. The court stressed that amendment would be warranted only where the claimant asserted a "genuine property interest" (*id.* at 1584)—that is, an interest in specific assets "held in constructive trust or traceable to such assets" (*id.* at 1583). *Schwimmer* rejected the "relaxed tracing standard" urged by the claimants, explaining that, "[b]ecause Congress has chosen to allocate to the Attorney General the power to remit funds for victim compensation, it is inappropriate

in the context of this case to relax conceptions of property rights in order to permit courts to compensate victims." *Id.* at 1584. The *Schwimmer* court's objection to the recognition of claims to untraced assets would apply with equal force to the facts of this case.

Indeed, in declining to recognize a constructive trust in this case, the district court relied in part on the difficulty that it would inevitably have encountered in attempting to evaluate whether petitioners' claims could be adequately traced to those BCCI assets subject to the court's jurisdiction. Pet. App. A28 (noting "the practical consideration of this Court's inability to adjudicate whether each of the approximately one million depositors can establish that they made deposits and that such deposits were forfeited by this Court"); *id.* at A30 n.6 (citing *Schwimmer* for the proposition that a constructive trust would assist petitioners "only if they could trace their interests to specific funds before the Court"). The court also relied on its assessment that imposition of a constructive trust in favor of petitioners would disrupt the "equitable, orderly, and expeditious" conduct of the global BCCI liquidation proceedings (of which the plea agreement in this case forms a part), and would "significantly harm the abilities of other BCCI creditors to recover fair portions of lost funds." *Id.* at A27-A28. The district court's refusal to impose a constructive trust on the facts of this case was plainly a reasonable exercise of its equitable discretion, and its reasons are consonant with those discussed in *Schwimmer*. There is accordingly no reason to believe that the outcome of this case would have been different in the Second Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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